Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS
CLERK

No. 81-332

IN THE

Supreme Court of the United States

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF ON BEHALF OF PETITIONER GLASGOW, INC.

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
Attorneys for Petitioner

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
Of Counsel

*Counsel of Record for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-6711

QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981 requires for its violation a finding of an intent to discriminate?

2. Whether, under 42 U. S. C. § 1981, a contractor may be liable for discrimination by a union where the contractor neither knew nor had reason to know of the discrimination?

3. Whether, under 42 U. S. C. § 1981, there can be vicarious liability by virtue of *respondeat superior* where the principal does not have either control or the right to control?

4. Whether 42 U. S. C. § 1981 creates a non-delegable duty to insure that others refrain from discrimination?

5. Whether under the circumstances of this case a non-wrongdoing contractor can be subjected to a far-reaching injunction which imposes, *inter alia*, substantial financial obligations on the contractor but which was issued only because of discriminatory conduct by a union?

PARTIES IN THE COURT OF APPEALS *

The parties in the court of appeals were:

Plaintiff-Appellees:

(a) the Commonwealth of Pennsylvania; and,

(b) twelve individuals (Messrs. Raymond Williams; Wille McKay; Marion J. Eaddy; Randolph Hughes, Jr.; Arel Brownlee; William Bostic; Kenneth Howard; Alpha Christmas; Ronald Richardson; Clarence Winder; Ronald Crawford; Frank Gilchrist) on their own behalf and as representatives of a class of similarly situated individuals.

Named Defendant-Appellants:

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: the Contractors Association of Eastern Pennsylvania, the United Contractors Association, the General Building Contractors Association, Inc., and Pennsylvania Excavating Contractors Association on behalf of themselves and as representatives of a defendant class of employer associations (all but the Pennsylvania Excavating Contractors Association are petitioners in this Court);[1] and,

---

* All references to the Appendix to Petitions for Certiorari will be designated by "PA. —"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. —".

1. The Pennsylvania Excavating Contractors Association dissolved in 1972 (PA. 29). In fashioning its decree, although the district court imposed a specific financial obligation of ten-percent (10%) on each of the other three named associations, it allocated no percentage of the total costs under the decree to the Pennsylvania Excavating Contractors Association.

(d) Glasgow, Inc., on behalf of itself and as the representative of a defendant class of employers.

Non-Party Members of Defendant Class-Appellants:

(a) Bechtel Power Corporation; and,

(b) United Engineers & Constructors, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE COURT OF APPEALS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
THE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. The NLRA Cases Cited By the District Court Do Not Support the Imposition of Liability Upon Glasgow and Instead Require That Glasgow Be Held Not Liable	14
II. The Seniority-System Cases Relied Upon By the District Court are Inapposite	16
III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between Glasgow and the Union is Insufficient to Support the Imposition of Vicarious Liability	18
IV. § 1981 Does Not Create a Non-Delegable Duty, But If It Does It Could Not Have Been Violated By Glasgow In This Case	20
A. Neither the Language nor the Legislative History of § 1981 Give Rise to a Non-Delegable Duty	22
B. Compelling Policy Considerations Dictate That § 1981 Does Not Create a Non-Delegable Duty	23

TABLE OF CONTENTS (Continued)

Page

C. Even if § 1981 Creates a Non-Delegable Duty, Glasgow Could Not Have Violated It In This Case 24

1. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion that for § 1981 to be Violated There Must Be a Finding of Discriminatory Intent 25

2. The Language and Legislative History of § 1981, as Well as Prior Decisions of this Court, Require a Determination that § 1981 Is Directed Only Toward Acts of Purposeful Discrimination 28

3. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme 30

V. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority 31

CONCLUSION 36

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. Gardner-Denver Co., 425 U. S. 36 (1974)	31
Amoco Oil Co. v. Environmental Protection Agency, 543 F. 2d 270 (D. C. Cir. 1976)	18
Buchanan v. Warley, 245 U. S. 60 (1917)	27
Carey v. Greyhound Bus Co., 500 F. 2d 1372 (5th Cir. 1974)	17
Chicano Police Officer's Ass'n v. Stover, 552 F. 2d 918 (10th Cir. 1977)	25
Cincinnati, No. 2 T. P. R. Co. v. Kentucky, 115 U. S. 321 (1885)	28
City of Memphis v. Greene, — U. S. —, 101 S. Ct. 1584 (1981)	29
City of Milwaukee v. Saxbe, 546 F. 2d 693 (7th Cir. 1976)	25
Craig v. County of Los Angeles, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, — U. S. —, 101 S. Ct. 1364 (1981)	25
Croker v. Boeing, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981)	25, 28, 29
Dayton Board of Education v. Brinkman, 433 U. S. 406 (1977)	11, 33
Des Vernes v. Seekonk Water Dist., 601 F. 2d 9 (1st Cir. 1979)	25
Detroit Police Officer's Ass'n v. Young, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, — U. S. —, 101 S. Ct. 3079 (1981)	25
Donnell v. General Motors Corp., 576 F. 2d 1292 (8th Cir. 1978)	25
Drexel v. Union Prescription Centers, Inc., 528 F. 2d 781 (3d Cir. 1978)	19
EEOC v. Enterprise Association Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977)	34
EEOC v. International Union of Operating Engineers, Local 14, 553 F. 2d 251 (2d Cir. 1977)	34

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Griggs v. Duke Power Co., 401 U. S. 424 (1971) 29
Grigsby v. North Mississippi Medical Center, Inc., 586 F. 2d 457 (5th Cir. 1978) 25
Guardians Ass'n. v. Civil Service Comm'n, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432) 25, 28, 29
Hurd v. Hodge, 334 U. S. 24 (1948) 26
International Brotherhood of Teamsters v. U. S., 431 U. S. 324 (1977) 9, 16, 17
Johnson v. Alexander, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978) 25
Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d 1364 (5th Cir. 1974) 17
Johnson v. Railway Express Agency, Inc., 421 U. S. 454 (1975) 31
Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968) 27, 29
Kinsey v. First Regional Securities, Inc., 557 F. 2d 830 (D. C. Cir. 1977) 25
Lipka v. U. S., 369 F. 2d 288 (2d Cir. 1966) 20
Lummus Co. v. NLRB, 339 F. 2d 728 (D. C. Cir. 1964) .15, 16
Mescall v. Burrus, 603 F. 2d 1266 (7th Cir. 1979) 25
Milliken v. Bradley, 418 U. S. 717 (1974) 33
Monell v. Department of Social Services of the City of New York, 436 U. S. 658 (1978) 12
Morrison-Knudsen Co., Inc. v. NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) 9, 14, 15, 16
Myers v. Gilman Paper Corp., 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977) 17
NLRB v. Houston Chapter, Associated General Contractors of America, Inc., 349 F. 2d 449 (5th Cir. 1965) 10, 23
NLRB v. Master Stevedores Association of Texas, 418 F. 2d 140 (5th Cir. 1969) 15, 16

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

NLRB v. Southern Stevedoring and Contracting Co., 332 F. 2d 1017 (5th Cir. 1964) 16

NLRB v. United States Steel Corp., 278 F. 2d 896 (3d Cir. 1960) 14

Northwest Airlines, Inc. v. Transport Workers Union, — U. S. —, 101 S. Ct. 1571 (1981) 23

Occidental Life Insurance Co. v. EEOC, 432 U. S. 355 (1977) 31

Olds v. Pennwalt Chemicals Corp., 432 F. 2d 1033 (6th Cir. 1970) 23

Peter v. Public Constructors, Inc., 368 F. 2d 111 (3d Cir. 1966) 20

Rizzo v. Goode, 423 U. S. 362 (1976) 33

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971) 17

Runyon v. McCrary, 427 U. S. 160 (1976) 26, 30

Sledge v. J. P. Stevens & Co., 585 F. 2d 625 (4th Cir. 1978) . 34

Strauder v. West Virginia, 100 U. S. 303 (1879) 27

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) 33

Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961) 10, 23

Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 410 U. S. 431 (1973) 26, 29

United States v. Wong Kim Ark, 169 U. S. 649 (1898) 26

Washington v. Davis, 426 U. S. 229 (1976) 10, 25, 27, 28, 30

Williams v. DeKalb County, 582 F. 2d 2 (5th Cir. 1978) ... 25

Williamson v. Southwestern Bell Telephone Co., 265 S. W. 2d 354 (Mo. 1954) 23

TABLE OF AUTHORITIES (Continued)

Constitution and Statutes: **Page**

The Fourteenth Amendment 2, 25, 26, 28, 30
Civil Rights Act of 1866 [14 Stat. 27] 25, 27, 29
Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e *et seq.* 4, 13, 16, 17, 29, 30
Revised Statutes § 1977 27
Voting Rights Act of 1870 [16 Stat. 144] 25, 26
28 U. S. C. § 1254(1) 2
29 U. S. C. §§ 158(a)(1) and (2) 15, 18, 24
42 U. S. C. § 1981 ..... *passim*
42 U. S. C. § 1982 ..... 25, 28, 29
42 U. S. C. § 1983 ..... 12, 34

Other Authorities:

Restatement (2d) of Agency, § 1 15
Restatement (2d) of Agency, § 2(1) 18
Restatement (2d) of Agency, § 214 ..... 13, 20, 21, 22
Restatement (2d) of Agency, § 219 18
J. Pomeroy, Equity Jurisprudence § 1338 (5th ed. 1941) ... 34

No. 81-332

IN THE

Supreme Court of the United States

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, and RAYMOND WILLIAMS, et al.,

Respondents.

BRIEF ON BEHALF OF PETITIONER GLASGOW, INC.

OPINIONS BELOW

District Court

The opinion of the United States District Court for the Eastern District of Pennsylvania setting forth the findings of fact and conclusions of law respecting liability is officially reported at 469 F. Supp. 329 (PA. 9). The district court also issued a separate judgment and decree, which was accompanied by a supplemental opinion. The judgment and decree (PA. 228) is not officially reported. The supplemental opinion is officially reported at 488 F. Supp. 988 (PA. 213).

Court of Appeals

Argument on appeal was initially heard by a panel of three judges in the United States Court of Appeals for the Third Circuit. Before a decision was issued, the court ordered reargument *en banc*. Following reargument before six of the active judges, the judgment of the district court, because of an equally-divided vote, was affirmed. The one-sentence *per curiam* opinion of the court is officially reported at 648 F. 2d 923 (PA. 8).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1981. A timely petition for a writ of certiorari was filed by petitioner in No. 81-332 on August 17, 1981. On October 19, 1981, this Court granted the petition. This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE PROVISIONS INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The following pertinent sections of the Fourteenth Amendment are involved in this case:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

This case involves an exclusive union hiring hall or referral system which was conceived and imposed by collective bargaining on construction contractors by Local 542, International Union of Operating Engineers ("Union"). The jurisdiction of the Union is the eastern half of Pennsylvania and the State of Delaware. The provision in the Union's collective bargaining agreements relating to the referral system is racially neutral on its face and otherwise lawful (PA. 30).

The case was bifurcated for trial into liability and back-pay phases. The back-pay phase has not yet taken place. The case was tried as a class action both on the plaintiffs' side and on the defendants' side (PA. 17-18). The twelve individual black plaintiffs are class representatives for all persons similarly situated. Glasgow, a suburban Philadelphia construction contractor, was made the class representative for contractors (sometimes estimated at 1,400) who, like Glasgow, were required to use the Union's referral system. Four associations of construction contractors were made class representatives for other associations who were involved in collective bargaining negotiations with the Union. These four associations are: the Contractors Association of Eastern Pennsylvania, which is a Pennsylvania non-profit corporation ("CAEP"); the United Contractors Association, a loosely-knit unincorporated contractor association ("UCA"); the General Building Contractors Association, Inc., which is a Pennsylvania non-profit corporation ("GBCA"); and the Pennsylvania Excavating Contractors Association, which was dissolved in 1972 ("PECA") (PA. 14-15, 29).

The district court, through the Honorable A. Leon Higginbotham, Jr., determined that the Union's referral system was intentionally operated by the Union in a ra-

cially-discriminatory fashion, in direct violation of its collective bargaining agreement and of 42 U. S. C. § 1981, as well as in violation of Title VII of the Civil Rights Act of 1964 (PA. 120, 164-65).

That court also held that Glasgow and the contractors in the class that it represents who, because of their legal obligation to do so, used the Union's referral system, and the CAEP, UCA, and GBCA, as well as the associations in the class that they represent, are vicariously liable under § 1981, notwithstanding its findings that Glasgow, the other contractors, and the associations neither knew nor had reason to know of the Union's discrimination. It also found that there was a failure to prove that Glasgow or the associations intended to discriminate. The district court further found that neither Glasgow nor any contractor or any association directly violated § 1981 (PA. 168, 195-96, 198, 212).[2]

The court of appeals affirmed unanimously the district court's holding against the Union, but then divided equally on the issue of the liability of the contractors and associations, thereby affirming the district court (PA. 9).

Through 1961, any contractor, including Glasgow, which had the legal duty to bargain and had a collective bargaining agreement with the Union was free to obtain qualified operating engineers from any available source (PA. 23). However, in 1961 the Union set out to impose on all contractors working within its jurisdiction an exclusive hiring-hall referral system by demanding in its labor negotiations that year the inclusion of such a system

2. The district court determined that there was not before it any claim under Title VII against either the associations or Glasgow. This determination is implied in the opinion of the court, and is fully supported by the uncontested fact that the associations and Glasgow were not parties to any charge before the Equal Employment Opportunity Commission, a prerequisite to an action in a federal court under Title VII (PA. 331).

in its collective bargaining agreement (PA. 23). If imposed, this system would require any employer who had the duty to bargain with the Union to use the Union as its sole and exclusive source for operating engineers (PA. 24-26).

These negotiations with the Union in 1961 were taking place on several fronts throughout the Union's work jurisdiction. Included among these were Delaware, where a Delaware contractors association was negotiating with the Union on behalf of contractors represented by it, and Philadelphia, where the CAEP [3] and GBCA were negotiating with the Union on behalf of contractors represented by them (PA. 23). Although there was severe opposition to the Union's demand for an exclusive referral system, the employers were informed by the National Labor Relations Board that they, through their representatives, were subject to a legal duty to bargain in good faith with the Union in respect of this demand because it is a mandatory subject of collective bargaining (JA. 306).

The persistence of the Union for the exclusive hiring-hall provision and the severe opposition of the contractors, through their representatives, eventually were transformed into a bargaining impasse over the referral-system issue, and a strike, which the district court characterized as "destructive," ensued. This strike lasted for ten weeks (PA. 23). In the face of this strike, and, as the district court found, with the "prospect of serious adverse economic consequences" if the strike continued, and also confronted with the reality that the "Union would not compromise for any other hiring alternative", the associations finally surrendered to the Union's exclusive referral demand (PA. 21, 23).

3. Glasgow had assigned its bargaining rights to the CAEP. Likewise, the UCA had assigned to the CAEP the bargaining rights of its members.

In the negotiations for their next collective bargaining agreement in 1963, the contractors, through their representatives, which included CAEP and GBCA, unsuccessfully attempted to oust the referral system from the collective bargaining agreement with the Union. Once again, however, the Union struck over this issue, and after another serious and lengthy strike, the contractors again were forced to capitulate (JA. 310).

At this juncture, it is most important to understand: (i) that the district court correctly found that "[t]he hiring hall system is on its face neutral"; and (ii) that the intentional discrimination which the district court found was practiced by the Union in the actual operation of the referral system was *in violation of*, and *not in compliance with*, the rules spelled out in the collective bargaining agreement for operation of that racially-neutral system [4] (PA. 30). In fact, the district court had this to say concerning the Union's actual operation of the referral system: "The union procedures in general constituted a motley fabric of arbitrary departures from the rules" (PA. 120).

In substance, the 1961 exclusive referral system has remained in the Union's collective bargaining agreement continuously to the present date.[5] Therefore, in that period, any and all of the more than fourteen-hundred contractors who have functioned under the Union's collective bargaining agreement, including Glasgow, have

4. Briefly summarized, except for certain specific limited situations, the referral system under the agreement was basically a "FIFO" (first in, first out) system, provided the individual seeking referral asserted that he was able to operate the piece of equipment for which the contractor was requesting an operator.

5. Because of its size, the Union is divided into five districts, and there is a separate hiring hall for each district. One covers the five-county Philadelphia area. Another covers the State of Delaware. The other three cover the remaining twenty-nine counties in eastern Pennsylvania (PA. 28-29).

been required to use the exclusive referral system (PA. 24-26). But, as the district court found, these defendant-class contractors—including Glasgow—did so without any knowledge or reason to know that the Union was violating the contractual rules for the referral system and by so doing was giving rise to the disparate racial impact which forms the basis for the decision by the district court against the Union (PA. 168).

Notwithstanding these now unchallenged findings, the district court held that Glasgow and the defendant-class contractors were vicariously liable under § 1981 for the Union's discrimination, this vicarious liability being based on the simple fact that they "relied contractually upon the hiring hall" (PA. 168). A similar holding was made for the associations based solely on the even more insignificant fact that they "participated in the creation or approval of an exclusive hiring hall provision", albeit that such provision was neutral on its face and only in its violation by the Union did the discrimination take place (PA. 128).

Immediately following the issuance of the opinion by the district court on January 2, 1979, Glasgow and the CAEP, UCA, and GBCA, among others, requested the Union immediately to remove the referral-system provision from the collective bargaining agreement. The purpose for this request was to terminate any potential future liability to the contractors as a result of their use of the referral system. When the Union refused to comply with the request, the grievance machinery of the collective bargaining agreement was invoked on behalf of the contractors. A final and binding decision by labor arbitrator Jay Kramer ruled that in view of the district court's decision, Glasgow and other employers did not have any further obligation under the agreement to use the Union's referral system. Upon a motion made by the Union im-

mediately following this decision, the district court overrode this ruling and enjoined the contractors, including Glasgow, to continue the use of the referral system, while imposing a racial quota on the referrals made by the Union (JA. 380-84).

In its judgment and decree, the district court mandated extensive and far-reaching injunctive five-year relief against all fourteen-hundred or more contractors, including Glasgow, as well as the associations. This mandatory injunction required, *inter alia,* minority hiring quotas upon all contractors, the implementation of skills training and upgrading programs for minorities, and a vast network for monitoring and auditing employer reporting of minority utilization (PA. 234-35, 241-44, 247-50). Under subsequent supplements to the decree, the district court ordered Glasgow to pay 5% of the total expenses incurred in supporting the ongoing injunctive program imposed upon the Union and all contractors with whom it had a collective bargaining relationship. Through the first year of this five-year mandated program, the total expense has been approximately $200,000 [6] (PA. 285).

6. Moreover, in its judgment and decree, the district court awarded reasonable attorneys' fees and costs to the named plaintiffs and Commonwealth (PA. 251). Counsel for the plaintiffs and Commonwealth have already requested the district court for an initial award of counsel fees for services through March, 1980, of over $1 million dollars and are seeking that said award be imposed jointly and severally among the named defendants.

SUMMARY OF ARGUMENT

1. Of the many cases cited by the district court in its liability opinion, none supports the vicarious liability decision against Glasgow made by that court and affirmed through the equally-divided vote of the court of appeals. The district court cited a line of cases under the National Labor Relations Act, the leading of which is *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) (PA. 169-73). This line was cited for the proposition that an employer may be held liable for a union's hiring-hall discrimination even though the employer did not have knowledge of the discrimination. The district court misread these cases, including *Morrison-Knudsen*. Instead, these cases, which actually support Glasgow's position here, require that in such a case no liability may be imposed on an employer who neither knew nor had reason to know of the union's discrimination.

2. In addition, the line of cases cited by the district court which held a union and an employer jointly liable for the racially disparate impact of a facially-neutral seniority provision in a collective bargaining agreement is inapposite (PA. 181-86). In those cases, the disparate impact resulted from a performance of the agreement in the manner *intended* by the parties thereto. In the case at bar, the disparate impact, which is the basis for the decisions by the courts below, resulted from a *breach* by the Union of the agreement, thereby frustrating the result intended for the facially-neutral referral-system provision. And, in any event, the vitality was removed from this line of cases by the decision of this Court in *International Brotherhood of Teamsters v. U. S.*, 431 U. S. 324 (1977).

3. The courts below incorrectly applied the doctrine of *respondeat superior* to reach their vicarious liability

decision. Glasgow—and for that matter any other contractor—neither controlled nor had the right to control the Union's operation of its referral system. Therefore, the Union *vis a vis* Glasgow was at most an independent contractor, for whose torts Glasgow cannot be liable.

4. 42 U. S. C. § 1981 does not create, as was held by the courts below, a so-called non-delegable duty, which they did not define but which it may be inferred is for Glasgow to insure that the Union refrain from denying equal rights in the operation of the Union's referral system. The language of the statute itself and its legislative history do not support such an interpretation. Likewise, sound policy considerations dictate that no such duty exists. This Court has approved the use of referral systems in the construction industry. *Teamsters Local 357 v. NLRB,* 365 U. S. 667 (1961). Federal labor policy has favored their use by making exclusive referral systems mandatory subjects of collective bargaining, thereby conferring upon unions the right to strike to impose them upon an employer. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.,* 349 F. 2d 449 (5th Cir. 1965). However, the interpretation given § 1981 by the courts below incorporates into the legal fabric this harmful incongruity: an employer virtually may be forced to accept and use a union's referral system and then may be held absolutely liable for discrimination by the union in the operation of the system, even where that employer neither knew nor had reason to know of the discrimination.

5. But even if § 1981 does contain a non-delegable duty that an employer like Glasgow must insure that a union refrain from denying equal rights in the operation of an exclusive referral system, Glasgow could not have breached that duty in this case. This Court in *Washington v. Davis,* 426 U. S. 229 (1976) held that the Fourteenth

Amendment requires for its violation an intent to discriminate. § 1981 has a close relationship to the Fourteenth Amendment. For this reason, as well as its language and legislative history and sound policy considerations, this Court should hold that § 1981 also requires for its violation a finding of an intent to discriminate. In view of the finding below that there was a failure to prove that Glasgow intended to discriminate, Glasgow could not have violated § 1981 (PA. 168, 195, 198, 212).

6. The courts below did not find that Glasgow directly violated § 1981. Instead, they concluded only that Glasgow is vicariously liable for the discrimination committed by the Union (PA. 195-96). Notwithstanding, Glasgow, together with other employers, was enjoined to attain specific hiring quotas over a five-year period and to participate in and to pay substantial monies to finance reporting, training, and upgrading programs. Since this Court has instructed that any federal-court injunction should not exceed in scope the wrong sought to be remedied, Glasgow should be relieved of any obligation under any decree in this case. *Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977).

ARGUMENT

The decision by the district court, as affirmed by the court of appeals, in respect of Glasgow was relatively simple and uncomplex: Glasgow is vicariously liable[7] for the discrimination by the Union because Glasgow "relied contractually upon the hiring hall" (PA. 128). The courts below found this liability even though the district court made the now unchallenged finding of fact that Glasgow neither knew nor had reason to know of the Union's discrimination (PA. 168).

Upon examination of the lengthy liability opinion of the district court, it becomes apparent that that court was

---

7. This case raises the threshold question of whether there can be any vicarious liability at all under § 1981. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains "a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well may not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth herein, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

relying upon four separate bases for its vicarious liability ruling:

> (1) that which the district court referred to as "analagous National Labor Relations Act cases";
>
> (2) that which the district court referred to as "Title VII cases in which an employer's agreement to a facially neutral hiring hall system [sic] [8] had a discriminatory impact";
>
> (3) that which the district court referred to as "cases and principles relating to the applicability of *respondeat superior* liability under § 1981"; [9] and
>
> (4) perhaps what should be a subheading under (3), the presence in § 1981 of some undefined nondelegable duty which the district court perceived by "[a]nalogy to Section 214 of the Restatement (second) of Agency." [10]

When these bases are subjected to scrutiny, it quickly becomes obvious that whether taken individually or collectively, they do not lend any support whatever to the conclusion that Glasgow is liable for the discrimination committed by the Union.

---

8. The cases cited by the district court involved facially-neutral *seniority* systems, not *hiring-hall* systems.

9. PA. 169.

10. PA. 192-93. In what purports to be a summary of the bases for the vicarious liability conclusion by the district court (PA. 169), there appears in (2) a reference to certain Title VII and § 1981 decisions. Although it may appear that these cases are used by the district court to ground liability, in fact that court, rather than relying on these cases, attempted to distinguish them.

I. The NLRA Cases Cited by the District Court Do Not Support the Imposition of Liability Upon Glasgow and Instead Require That Glasgow Be Held Not Liable.

The district court cited some cases decided under the National Labor Relations Act as support for its conclusion that Glasgow is vicariously liable for the Union's discrimination (PA. 169-73). The NLRA cases were cited by the district court because of its view that they held an employer liable for union-membership discrimination by a union in the operation of a referral system where the employer did not have knowledge or reason to know of the discrimination. A careful reading of these cases, however, reveals that the district court interpreted these cases incorrectly. Instead of the interpretation placed upon them, these cases require that no liability attach to an employer who neither knew nor had reason to know of discrimination being practiced by a union in its operation of a facially-neutral referral system. Since Glasgow neither knew nor had reason to know of the Union's discrimination, this line of cases requires that Glasgow be held not liable.

In this context, the district court relied virtually entirely upon one decision: *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961).[11] In that case, a union which operated

11. The district court also makes reference to the decision in *NLRB v. United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960) in support of its notion that, under the NLRA, the action of a union agent may be chargeable to the employer principal on some type of vicarious liability theory. In *U. S. Steel*, however, the "union" agent, for whose discriminatory hiring decisions liability was imputed to the employer, was in fact a *supervisory employee* of the company and had been given the authority to act as a hiring agent.

an exclusive hiring hall discriminated against non-union individuals in referrals to an employer and forced non-union individuals to pay it a license fee known as "dobie". The court of appeals noted that the union acted as the employer's agent [12] in selecting the workers to be hired and that the union's discriminatory acts were properly chargeable to the employer as principal. The court stated, however, that it was clear that the employer knew of the illegal collection of the dobie and knew to some extent of the union's discriminatory referrals. 275 F. 2d at 917. The court of appeals therefore affirmed the findings of the NLRB that the employer had violated Section 8(a)(3) of the Act.

Despite these facts, the district court extrapolated from *Morrison-Knudsen* the sweeping proposition that under the NLRA, an employer is responsible, on some type of absolute liability basis, for the discriminatory acts which a union commits in the operation of an exclusive hiring hall from which that employer obtains applicants for employment without regard as to whether the employer knew or had reason to know of the discrimination. However, two other courts of appeals which have confronted the issue of the *Morrison-Knudsen* holding interpret that holding in a way diametrically opposed to the interpretation of the district court here. These courts have noted that *Morrison-Knudsen* involved a situation in which it was clear that the employer had some knowledge of the union's discrimination. *See NLRB v. Master Stevedores Association of Texas*, 418 F. 2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB*, 339 F. 2d 728 (D. C. Cir. 1964). Furthermore, these courts expressly require that in order

12. Since the principal-agent relationship must be fiduciary in nature, as a matter of law a union never should be the agent of an employer. *See*, Restatement (2d) of Agency, § 1; 29 U. S. C. §§ 158(a)(1) and (2).

for liability to attach to such an employer, the employer must know or have reason to know of the union's discrimination. *Master Stevedores, supra,* 418 F. 2d at 142; *Lummus, supra,* 339 F. 2d at 737. *See also NLRB v. Southern Stevedoring and Contracting Co.,* 332 F. 2d 1017 (5th Cir. 1964). The principles which these NLRA cases enunciate are, if anything, *stricter* than traditional common-law concepts in the cautionary approach which they take toward finding any liability relationship between an employer and the union which refers workers to it. *See Lummus, supra,* 339 F. 2d at 735-37.

Thus, despite the reliance of the district court upon *Morrison-Knudsen,* neither that decision nor other judicial authority under the NLRA supports the conclusion that an employer may be held liable for the discriminatory acts of the union in the absence of knowledge or at least reason to know of the discrimination. Since the district court found that the employers neither knew nor had reason to know of the Union's discrimination, the NLRA authorities dictate that an employer such as Glasgow is *not* liable (PA. 168).

II. The Seniority-System Cases Relied Upon by the District Court Are Inapposite.

The second of the bases used by the district court to impose vicarious liability on Glasgow involves facially-neutral seniority-system provisions, the application of which resulted in an actionable discriminatory impact upon minorities under Title VII of the Civil Rights Act of 1964. These cases plainly are distinguishable from the matter at bar.

In these cases, decided prior to the decision of this Court in *International Brotherhood of Teamsters v. U. S.,*

431 U. S. 324 (1977),[13] employer liability arose *directly* from compliance with the terms of a facially-neutral seniority provision, the performance of which resulted in a discriminatory impact upon minorities (PA. 181-86). However, in these seniority cases, as the district court recognized, the discriminatory impact resulted from the performance of the collective bargaining agreement in the manner *intended* by the employer and the union. Liability in these cases, therefore, was assessed jointly against the employer and the union. In the instant case, however, the district court found that the discriminatory impact occurred because the Union acted in breach of the agreement (PA. 120). The court recognized that if the Union complied with the agreement, the hiring-hall provisions thereof would not have created any actionable discriminatory impact (PA. 30, 120). But it determined that only "a short conceptual step" is required to impose liability *vicariously* upon an employer which, although contractually bound to make use of the Union's referral system, had no knowledge or reason to know of the Union's acts of discrimination (PA. 186). Nothing in these cases supports the long conceptual leap which the district court strained to make in creating this vicarious theory of liability.

---

13. The cases referred to are: *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F. 2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971). These decisions reflect the state of the law prior to *Teamsters*, in which case this Court ruled that a bona fide seniority system which has a discriminatory impact upon minorities is exempt from liability by virtue of Section 703(h) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(h).

III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between Glasgow and the Union Is Insufficient to Support the Imposition of Vicarious Liability.

The third of the bases used by the district court to impose vicarious liability on Glasgow is a use of the doctrine of *respondeat superior*.[14] This doctrine makes a master liable for the torts of his servant acting within the course of his employment. Under well-settled master-servant principles, Glasgow may be liable to the plaintiffs in this action if it is determined that the Union was Glasgow's servant in the operation of the referral system and that the Union was acting within the course of its employment. If it is determined that the Union was not the servant of the master Glasgow, and therefore was at most an independent contractor, Glasgow may not be held vicariously liable under the doctrine of *respondeat superior* for any torts of the Union. *See* Restatement (2d) of Agency, § 219.

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. *Id.* at § 2(1). Therefore, if control of or the right to control the Union by Glasgow was absent, the Union was not the servant of Glasgow, but was instead at most an independent contractor. If an independent contractor, the general rule of *respondeat superior* is that Glasgow could

14. In the absence of specific language on the part of Congress to the contrary, federal courts must apply the traditional common-law rules of vicarious liability in interpreting federal statutes. *Amoco Oil Co. v. Environmental Protection Agency*, 543 F. 2d 270, 275-76 (D. C. Cir. 1976).

not be liable for any tort, including a violation of § 1981, of the Union.

The opinion of the district court clearly recognizes that Glasgow did not in fact control the Union's referral system. If Glasgow had that control, it arguably would have constituted an unfair labor practice under 29 U. S. C. §§ 158(a)(1) and (2). However, the district court appears to suggest that Glasgow and the other contractors retained some right to control the referral system. In what seems to be an analysis of the element of the right to control, the district court simply stated that the contractors were entitled to a hiring hall system which adhered to the terms of the collective bargaining agreement, one term of which prohibited racial discrimination (PA. 29-30, 192). Such an analysis, however, misapprehends the nature of the "right to control" test. That test focuses not on the principal's right to control the *results* of the other's performance, but rather on whether the principal retains the right to direct the other's manner of performance. *See Drexel v. Union Prescription Centers, Inc.*, 582 F. 2d 781, 785 (3d Cir. 1978).

Even as found by the district court, the facts indicate that an employer such as Glasgow did not have the right to control the Union's manner of achieving the ends specified in the collective bargaining agreement. Plainly, the mere recitation in the collective bargaining agreement of the details of the service which the Union was to provide an employer does nothing more than describe with a certain degree of specificity the *result* which the Union must achieve. In that respect, the hiring-hall provisions of the agreement are akin to an architect's specifications which are incorporated into the contract between an owner and a general contractor for the construction of a building. It is plain that an owner having no control over the day-to-day performance of the general contractor does not have a master-servant relationship with that contractor. *See,*

e.g., Lipka v. U. S., 369 F. 2d 288, 291 (2d Cir. 1966); *Peter v. Public Constructors, Inc.*, 368 F. 2d 111, 113 (3d Cir. 1966). Like that owner, an employer such as Glasgow had no participation in the day-to-day operation of any of the five Union-run hiring halls. As an employer, Glasgow would simply phone the appropriate Union hiring hall and inform the dispatcher on duty of its need for an operator. In return, an operator would show up for work as requested.[15]

Since Glasgow did not have the right to control the Union in the Union's operation of its referral system, no master-servant relationship existed between Glasgow and the Union. Glasgow, therefore, cannot be held liable under the doctrine of *respondeat superior* for the discriminatory acts of the Union, at most an independent contractor.

IV. § 1981 Does Not Create a Non-Delegable Duty, But if It Does It Could Not Have Been Violated by Glasgow in This Case.

The final one of the four bases used by the district court in its attempt to support its liability theory against Glasgow is that, by analogy to Restatement (2d) Agency, § 214, § 1981 should be interpreted as creating a so-called non-delegable duty which makes Glasgow liable. Although it refers to such a duty, the district court does not express precisely what that duty is.

To gain some understanding of the district court's ruling in this regard, it is helpful to focus on why it took

15. In addition, the district court pointed to the presence of a grievance procedure for complaints by *applicants* against the Union's operation of the hiring hall as an indicium of an *employer's* right to control the Union's performance. But it is obvious that a mechanism which inures to the benefit of an applicant and the application of which is triggered by the complaint of an applicant gives an employer *no right* of control at all.

this novel position. As previously set forth, there simply is no basis in the record of this case for a determination that the Union was the servant of Glasgow, which determination would have justified the conclusion that Glasgow, as master, is vicariously liable for the torts of the Union. Therefore, it is clear that the Union was at most an independent contractor in respect of Glasgow.

As previously set forth, the general rule is that a principal is not liable for the torts of an independent contractor. However, as recognized in § 214, as to a few somewhat unique fact patterns, a principal may be held liable for a failure by an independent contractor to discharge a duty *owed by the principal to a third party.* The duty found in these fact patterns is referred to as a non-delegable duty on the part of the principal.

Lacking any basis whatever to impose vicarious liability under the general rule, the district court reached out for the non-delegable duty exception, and then without precedent, analysis, or hesitation that court read a non-delegable duty into § 1981. Again, significant by its absence is any definition by the district court of the nature of the non-delegable duty that it had so easily created to impose liability.

A study of § 214 and of the district court's opinion reveals that what in substance the district court was concluding was that § 1981 contains not only a duty for an employer itself to refrain from denying equal rights in the employment process, but also, if that employer uses another to perform a portion of its employment process, then that employer is subject to a further duty to insure or guarantee that the other refrains from denying equal rights. Such an interpretation of § 1981 is not warranted (1) by the language of the statute itself and its legislative history; and (2) by compelling policy considerations.

At this juncture, it is important to understand that Glasgow is not contending that it may delegate or otherwise rid itself of the fundamental duty imposed by § 1981: the duty to refrain from denying to any person the same right as is enjoyed by white persons to make and enforce contracts. It is plainly recognized that Glasgow is subject to this duty created by § 1981, and that Glasgow through contract or otherwise cannot relieve itself of this duty. But this fundamental duty of § 1981 was not violated by Glasgow in this case, and the district court so ruled (PA. 168). What the district court did rule is that, although Glasgow did not itself discriminate, since § 1981 makes Glasgow an insurer for the conduct of the Union, when the Union discriminated, Glasgow became liable therefor (PA. 198). Under § 214, this liability of Glasgow is not vicarious, but instead is the breach by Glasgow of a duty owed by it directly to the plaintiffs, a duty stemming necessarily from § 1981 and referred to as non-delegable.

Before turning to a discussion of the reasons why § 1981 should not be interpreted as creating a non-delegable duty, if this Court were to conclude that § 1981 does create such a duty, it could not have been violated in this case by Glasgow. § 1981 plainly requires for its violation a finding of an intent to discriminate, and the district court made the unchallenged finding that there was a failure to prove that Glasgow intended to discriminate (PA. 195).

A. Neither the Language Nor the Legislative History of § 1981 Give Rise to a Non-Delegable Duty.

Any reading of § 1981 results in the conclusion that it does not create a non-delegable duty for one person to insure that others refrain from denying equal rights. The statute is an unparticularized declaration that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons; it does not even identify any

person upon whom any duty falls. Nothing in § 1981 gives rise to an inference that anything even approaching the absolute liability which the district court imposed upon Glasgow was created by this broad but amorphous prohibition on racial discrimination.

When the district court read such a non-delegable duty into § 1981, and in light of the absence of any support in the legislative history of that statute, it plainly violated the rules for statutory construction so clearly defined by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981). And, this interpretation by the district court likewise was contrary to the rule that a non-delegable duty may only be imposed upon an employer by statute "if the statute in question [is] of such a tenor as to subject him to a definite obligation in respect of the matter." *Williamson v. Southwestern Bell Telephone Co.*, 265 S. W. 2d 354, 357 (Mo. 1954); *see also Olds v. Pennsalt Chemicals Corp.*, 432 F. 2d 1033, 1035 (6th Cir. 1970).

B. Compelling Policy Considerations Dictate That § 1981 Does Not Create a Non-Delegable Duty.

Not only does the language and legislative history of § 1981 fail to support the existence of a non-delegable duty therein, but also compelling policy considerations dictate such a conclusion.

This Court has indicated its approval of the use of referral systems in the construction industry. *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961). Since that case, federal labor policy has favored the use of referral systems in the construction industry by making them mandatory subjects of collective bargaining. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (5th Cir. 1965). Thus, a union may demand inclusion of such a provision in a collective bargain-

ing agreement. The employer must bargain in good faith respecting that demand. If agreement is not reached and the bargaining reaches impasse, the union then may bring its economic force to bear in the form of a strike. We would be remiss not to point out that this is precisely what occurred in this case.

With the interpretation given § 1981 by the courts below, and with the state of the federal labor policy being as set forth above, there now exists in the federal legal fabric the harmful incongruity that, on the one hand federal policy in substance forces a union referral system upon an employer, and on the other hand makes him absolutely liable for discrimination practiced by the union, even when the employer neither knew nor had reason to know of the discrimination. But, even if the employer knew of the discrimination, there is little if anything he could do either practically or as a matter of law to perform his non-delegable duty to insure that the union refrain from denying persons their equal rights. If the employer attempted to prevent the union's discrimination by controlling the referral system, that conduct likely would violate 29 U. S. C. §§ 158(a)(1) and (2). The central notion, therefore, underlying the imposition of a non-delegable duty upon a principal is frustrated because the principal is unable to carry out his duty.

C. Even if § 1981 Creates a Non-Delegable Duty, Glasgow Could Not Have Violated It in This Case.

Should this Court determine that § 1981 does create a non-delegable duty for Glasgow to insure that the Union refrain from denying equal rights in the operation of its referral system, that duty could not have been violated by Glasgow in this case because § 1981, this Court should hold, requires for its violation an intent to discriminate.

Fully nine of the courts of appeals[16] have either held or implied that proof of intentional discrimination is necessary under § 1981 in light of the decision of this Court in *Washington v. Davis*, 426 U. S. 229 (1976). If this Court does so hold, then the failure of contractors such as Glasgow to insure that the Union refrain from discrimination in referrals, to be actionable, must have been a racially-motivated intentional failure. Since the district court specifically found that there was a failure to prove an intent to discriminate by Glasgow, Glasgow could not have violated § 1981 (PA. 195).

1. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion That for § 1981 to Be Violated There Must Be a Finding of Discriminatory Intent.

§ 1981 was derived from both § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *Runyon v. McCrary*, 427 U. S. 160, 169 n. 8 (1976). Indeed, this Court has stated that "the operative language of both § 1981 and § 1982 is traceable to the Act of April

16. *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981); *Des Vernes v. Seekonk Water Dist.*, 601 F. 2d 9 (1st Cir. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432); *Williams v. DeKalb County*, 582 F. 2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F. 2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F. 2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F. 2d 1292 (8th Cir. 1978); *Craig v. County*

9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S. 431, 439 (1973); *Runyon v. McCrary*, 427 U. S. at 171.

Following the enactment of the Civil Rights Act of 1866, some members of the Congress became concerned that the Act's application to the states may have been violative of the Constitution and that a subsequent Congress might repeal the Act. A joint resolution which addressed these concerns later became the Fourteenth Amendment. *United States v. Wong Kim Ark*, 169 U. S. 649, 675 (1898). This Court has recognized that a major impetus behind enactment of the Fourteenth Amendment was the Congressional goal of treating these issues by incorporating the provisions of the 1866 Act into the Constitution. *Hurd v. Hodge*, 334 U. S. 24, 32-33 (1948). This Court has also recognized the close relationship between the 1866 Act and the Fourteenth Amendment in stating that the two enactments were "expressions of the same general congressional policy." *Id.* at 32.

Subsequent to the passage of the Fourteenth Amendment, the Civil Rights Act of 1866 was retained in its entirety as a part of the Voting Rights Act of 1870.[17] *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S.

16. (Cont'd.)

of Los Angeles, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); and *Chicano Police Officer's Ass'n v. Stover*, 552 F. 2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*, 557 F. 2d 830, n. 22 (D. C. Cir. 1977).

Obviously, the ruling of the Third Circuit in *Croker, supra*, is contradictory to the earlier ruling in the instant case by that same court.

17. Section 18 of the Voting Rights Act of 1870 provided in pertinent part: "That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted. . . ."

at 439 n. 11. Section 1 of the 1866 Act was reenacted, with minor revisions which did not alter its scope,[18] in § 16 of the 1870 Act. In 1874, § 16 of the 1870 Act was codified as § 1977 of the Revised Statutes, which today is codified as 42 U. S. C. § 1981. The language of Revised Statutes § 1977 was identical to that which constitutes § 1981, and this Court has stated that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step toward enforcing the constitutional provisions." *Strauder v. West Virginia,* 100 U. S. 303, 312 (1879); *see Buchanan v. Warley,* 245 U. S. 60, 79 (1917) (§ 1977 a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose.").

In addition to the common historical background and the congressional policy underlying the two provisions, a reading of the provisions *in pari materia* indicates that both are fundamentally *equal protection enactments.* Senator Trumbull, the author of the bill which was to become Section 1 of the Civil Rights Act of 1866 and eventually § 1981, in explaining its purpose stated that "any statute which is not *equal to all,* and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty . . ." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

In view of the above, it is apparent that the relationship of § 1981 and the Fourteenth Amendment is one which, for practical purposes, is so close that the two enactments are difficult if not impossible to separate on any basis. The two provisions have a common origin and directly relate to identical congressional goals.

In *Washington v. Davis,* 426 U. S. 229 (1976), this Court held that proof of a racially discriminatory intent

18. *See, Jones v. Alfred H. Mayer Co.,* 392 U. S. 409, 436 (1968).

or purpose is required in order to establish a Fourteenth Amendment equal protection violation. As a direct result of the demonstrated inseparable relationship between § 1981 and the Fourteenth Amendment, the intent standard which this Court required in *Washington v. Davis* must be applied to alleged violations of § 1981. Such a determination would be consistent with sound rules of statutory construction, which require statutes involving constitutional rights to be read in light of the Constitution, and indeed that "[t]he Constitution and the statute will be construed together as one law." *Cincinnati, No. 2 T. P. R. Co. v. Kentucky,* 115 U. S. 321, 334 (1885).

2. The Language and Legislative History of § 1981, as Well as Prior Decisions of This Court, Require a Determination That § 1981 Is Directed Only Toward Acts of Purposeful Discrimination.

There exists absolutely no indication in the language or legislative history of § 1981 which would support the extension of liability for violations thereof to other than acts of intentional or purposeful discrimination. On the contrary, in *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981), the court stated "if [the language] points in any direction, it suggests a requirement for proof of purposeful discrimination." *Id.* at 1575, *citing City Memphis v. Greene,* — U. S. —, 101 S. Ct. 1584, 1602 (1981) (White, J., concurring); *Guardians Ass'n. v. Civil Service Comm'n,* 633 F. 2d 232, 267 (2d Cir. 1980). Similarly, the legislative history unequivocally demonstrates that the 39th Congress was concerned with acts of purposeful racial discrimination which would deny black citizens their basic civil rights under the laws of the land.

Justice White, concurring in the decision of the Court in *City of Memphis v. Greene, supra,* a 42 U. S. C. § 1982 case, has stated that "nothing in the legislative history of

[the 1866] Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves." [19] Since this Court has clearly held that Sections 1981 and 1982 are so interrelated that they should be construed similarly when applied to private forms of discrimination, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. at 440, the rationale of Justice White's opinion is fully applicable to the instant § 1981 action. The legislative history of Title VII stands in stark contrast to that of § 1981 in that the former indicates congressional concern over the impact of neutral employment practices on employment opportunities. *See Griggs v. Duke Power Co.*, 401 U. S. 424, 434-36 (1971).

Likewise, prior decisions of this Court suggest a similar result. In *Jones v. Alfred H. Mayer Co.*, 392 U. S. at 426, which involved Section 1 of the Civil Rights Act of 1866, and specifically 42 U. S. C. § 1982, this Court held that § 1 of the 1866 Act, which was a source for § 1981,

19. 101 S. Ct. at 1603. Justice White also stated that "[t]he supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 322, 339-40, 474-75, 516-17, 1123, 1151-52, 1159-60, 1833-35 (1866)." *City of Memphis v. Greene*, 101 S. Ct. at 1603 (emphasis added). *See, Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases at 1577 ("We think that it is more likely than not that the statute was addressed to such intentional conduct . . . The employees have not directed our attention to any legislative history that reveals a contrary intent. We doubt that they could"); *Guardians Ass'n v. Civil Service Com'n.*, 633 F. 2d at 267 ("It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provisions understood the law to prohibit anything other than the racially motivated refusal to treat whites and non-whites in the same, neutral manner").

was intended to prohibit all "racially motivated" deprivations enumerated in the statute. *Id.* And, in *Runyon v. McCrary*, 427 U. S. at 170-71, this Court held that § 1981 would be violated if a Negro offeree is not extended the same opportunity to enter into contracts as is extended to white offerees, *solely because he was a Negro. Id.* Thus, the holdings of this Court also support the view that § 1981 requires proof of purposeful or intentional discrimination.

3. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme.

In *Washington v. Davis*, this Court indicated that the application of other than an intentional discrimination standard to the Fourteenth Amendment would raise serious questions about many existing statutes. 426 U. S. at 248. As demonstrated above, the scope of § 1981's prohibitions is virtually coextensive with that of the Fourteenth Amendment's equal protection clause. Both enactments extend well beyond the area of employment discrimination, and thus if § 1981's standard of liability is held to be less than that of the Fourteenth Amendment, the holding of *Washington v. Davis* may easily be circumvented by plaintiffs alleging a § 1981 cause of action in lieu of a Fourteenth Amendment based claim. "In fact, because § 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to § 1981 could be more intrusive than would one applied to the fourteenth amendment." *Croker v. Boeing Co.*, 26 FEP Cases at 1577 (citations omitted).

Moreover, Title VII is the regulatory scheme chosen by Congress in the employment discrimination area. Section 1981's application to this area is dissimilar to that of

Title VII in several important respects: 1) Title VII requires administrative prerequisites to suit while § 1981 has none;[20] 2) Title VII requires that attempts at conciliation be exhausted prior to initiation of suit while § 1981 does not;[21] 3) Title VII contains a two-year statute of limitations on back pay while § 1981 has no such limitation; [22] 4) § 1981 provides remedies which are distinct from those provided by Title VII.[23] All of the above-referenced differences between Title VII and § 1981 would tend to encourage plaintiffs to bypass and/or circumvent Title VII, the congressionally-chosen scheme, should this Court determine that a § 1981 violation can be sustained without proof of intent to discriminate. The number of employment discrimination cases reaching the federal court system would certainly increase, contrary to the intent of Congress in enacting Title VII.

V. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority.

The violations of law found by the courts below were the *Union's* discriminatory entry practices and its discriminatory implementation of a referral system which on its face was neutral and which, if operated properly, would

20. *Compare*, 42 U. S. C. § 2000e-5(e) and (f)(1) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 460-62 (1975).

21. *Compare, e.g., Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 359-60 (1977), and *Alexander v. Gardner-Denver*, 425 U. S. 36, 44 (1974), *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460-62.

22. *Compare*, 42 U. S. C. § 2000e-5(g) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460.

23. *See, Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 461.

not have resulted in discrimination. The court found specifically that all contractors, including Glasgow, were liable not because their own employment practices in any way violated § 1981, but simply because of their relationship to the tainted Union referral system (PA. 127-28, 168).

In view of its findings that the Union discriminated in entry and in its referrals, the district court quite properly imposed various affirmative obligations upon the *Union* designed to ensure, *inter alia*, that the referral system works properly. But the court also mandated an extensive remedial scheme directed to the defendant class of contractors—a financially expensive scheme which includes *inter alia*: (1) mandatory manpower utilization quotas and monthly and quarterly reports of compliance therewith; (2) participation in a mandatory skill upgrading program; and (3) the creation of a master's position, reporting and advisory committees, and the financing thereof.[24] Such sweeping injunctive relief against Glas-

24. In paragraphs 27 through 30 of its decree, as modified by its various post-decree orders, the district court has imposed upon each of the more than fourteen-hundred "defendant" contractors specific minority manpower utilization quotas that each must meet or risk further court-imposed sanctions. In this regard, at paragraph 29, the court not only ordered that a court-appointed master, to whom broad authority was delegated under paragraphs 9 to 11, would *audit* each of the more than fourteen-hundred contractors' performance on a quarterly basis, but also placed the burden of proving a valid reason for not reaching the court-imposed minority employment quotas on the individual contractor (PA. 243).

In conjunction with its imposition of these minority employment quotas, the district court at paragraph 43, as amended, mandated the structuring of an elaborate record-keeping and reporting system wherein each of the fourteen-hundred contractor members of the defendant class is required to file with the master, a reporting committee, and the plaintiffs both monthly and quarterly reports regarding the racial breakdown of hours worked and

gow and other members of the defendant class is inconsistent with the decisions of this Court. Moreover, although not finding any wrongdoing by Glasgow, the district court nevertheless ordered Glasgow to pay five percent (5%) of the total expenses of implementing the broad decree (PA. 285). So far, the expenses incurred in the first year under the five-year decree have already amounted to approximately $200,000. The end result of such an order is that the district court is requiring Glasgow to pay money damages for the wrongs actually committed by the Union.

Clearly, there is no basis under the well-established principles of equity law for the imposition of such liability against Glasgow. This Court has admonished on numerous occasions that in fashioning an equitable remedy for a violation of law, a federal court is required to tailor the scope of the remedy to fit the precise nature of the violation. *See Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977); *Milliken v. Bradley*, 418 U. S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *see also Rizzo v. Goode*, 423 U. S. 362 (1976).[25] The principles articulated in these

24. (Cont'd.)

wages earned by operating engineers. So, too, in paragraph 44 as amended, the district court set up a detailed enforcement system based upon these reports wherein on both a quarterly and annual basis the court-appointed master is permitted to hold compliance hearings and take corrective action on allegations of non-compliance against any one or all of the fourteen-hundred contractors required to make said reports (PA. 248-49).

In addition, the court in paragraphs 24, 41, and 42 imposed upon the defendant contractors the responsibility for retraining and upgrading programs to be developed under the auspices of a master and advisory committee (PA. 240, 247).

25. Seemingly, the logical extension of this principle is that, since a person held vicariously liable is not a tortfeasor, as a matter of law that person cannot be subject to an injunction

actions brought under 42 U. S. C. § 1983 apply with equal force in the area of employment discrimination. *See EEOC v. International Union of Operating Engineers, Local 14*, 553 F. 2d 251, 256 (2d Cir. 1977) (district court "should interfere with the defendant's operations no more than is necessary to [remedy the wrong]."); *Sledge v. J. P. Stevens & Co.*, 585 F. 2d 625, 650 (4th Cir. 1978) (vacating district court's imposition of quotas on the ground that the violations "are rectified by other of the injunctive provisions").

In light of these controlling principles, the district court, in fashioning its remedy, went far beyond the nature and extent of the violation proved. Therefore, this Court should direct the removal from the decree of all portions thereof which pertain to Glasgow, including that portion which specifically imposes the five percent (5%) financial obligation upon Glasgow.

Quite specifically, the district court, in accord with the plaintiffs' allegations,[26] found that the Union discriminated against minorities: (1) in entry into the Union; (2) in entry into the hiring-hall system; and (3) in actual selection for referral to work from the hiring-hall lists (PA. 30, 162). Accordingly, if these three discriminatory

25. (Cont'd.)

relating to the tort for which he is held vicariously liable. *See, EEOC v. Enterprise Association Steamfitters*, 542 F. 2d 579, 589 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977); J. Pomeroy, *Equity Jurisprudence* § 1338 (5th ed. 1941).

26. As the district court stated: "plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the *Union's alleged intentional refusal to follow their own hiring hall rules*, thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs *also allege* discrimination particularly in *admission into the Union* and *admission into the job referral process*" (emphasis added) (PA. 30).

practices did not exist, there would have been no basis upon which the district court could have relied to find that the Union denied minorities the opportunity to gain work as operating engineers. Therefore, for purposes of injunctive relief, if these three discriminatory practices are remedied by the court's injunction, the underlying basis of the Union's discrimination will have been cured. Clearly, this goal has been reached through the district court's specific imposition of affirmative entry and referral quotas upon the Union in its decree.

CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to Glasgow should be reversed and this Court should remand for entry of judgment in Glasgow's favor and for modification of the injunction so as to exclude Glasgow from its terms.

Respectfully submitted,

JOHN J. MCALEESE, JR.
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004

Attorneys for Glasgow, Inc., Petitioner

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004

Of Counsel.